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Cronan O'Connell
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REDACTED

April 20, 2005

EX PARTE

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW B-204
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Corporation for Forbearance
Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan
Statistical Area – WC Docket No. 04-223*

Dear Ms. Dortch:

On April 19, 2005, Cronan O'Connell and Melissa Newman of Qwest met with Jeremy Miller, Ian Dillner, John Adams and Erin Boone of the Policy Division of the Wireline Competition Bureau. Qwest's June 21, 2004 Petition for Forbearance in the above-captioned proceeding was the topic of the discussion.¹ In the scope of the meeting, Qwest distributed a presentation which contained information that Qwest has designated as confidential as well as information for which no claim of confidentiality need be made. During the meeting, we reviewed key arguments why forbearance should be granted in the Omaha, NE MSA. In particular, we updated the staff on the revised line counts for Qwest's residential and business retail access lines as of December 2004 from our counts as of February 2004. Residential retail lines have decreased to 120,483 from 136,572 and business retail line counts have decreased to 80,451 from 81,749. Staff then followed up with a request to augment the record with additional detailed information on the competitors in the Omaha MSA that were listed in the original filing, as well as any new information on wireless and VoIP competition.

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¹ See *Public Notice*, 19 FCC Rcd 11374 (2004), *erratum* to correct the docket number issued July 7, 2004.

Ms. Marlene H. Dortch
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of the *Protective Order* (19 FCC Rcd 11377 (2004)), the portions of the presentation for which Qwest claims confidentiality have been separated from the portions of the presentation which are not entitled to protection. The confidential portions of the presentation are being filed today, via hand delivery, under separate cover.

Pursuant to 47 C.F.R. § 1.1206(b)(2) the **REDACTED** version of the *ex parte* is being filed electronically via ECFS pursuant to 47 C.F.R. § 1.49(f)(1).

Sincerely,

/s/ Cronan O'Connell

Enclosure

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Qwest[®]



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Spirit of Service

Omaha MSA Forbearance Petition WC Docket 04-223

April 19, 2005

Competition has Developed in a Variety of Markets

❑ Qwest's Region is Unique:

- Disproportionately large in size and small in population
 - 14 states with 16M access lines
- Geographically diverse
- Low population density
- Fewer access lines than the other RBOC regions
- Contains only 12 of the “Top 100” MSAs – in contrast to SBC (over 40 MSAs in the top 100), Verizon (over 20) and BellSouth (over 20)
 - *The Omaha MSA ranks 74th in the United States today*

❑ And yet, significant intermodal and facilities-based competition has developed in Qwest markets of various sizes. For example:

- Cox cable telephony in Phoenix, Tucson, Omaha
- Comcast cable telephone in St. Paul, MN; Vancouver, WA; Issaquah, WA; Portland OR and throughout the Denver MSA
- Mid-Rivers (Independent overbuilder) in Terry, MT
- Silver Star (independent overbuilder) in Afton/Jackson, WY
- Black Hills Fibercom (facilities-based CLEC) in Black Hills, SD

Omaha MSA

(including Council Bluffs, Iowa)

- ❑ **Approximately 484,000 “wireline” access lines in the MSA**
 - Qwest has roughly 45% of these access lines (~218,000)
 - Approximately 53% of the lines in the MSA are offered by facilities-based (Non-resale and Non-UNE-P) providers
- ❑ **There are 24 Serving Wire Centers in the Omaha MSA (NE and IA combined)**
- ❑ **The Local Exchange Routing guide (LERG) lists a total of eight CLECs with prefixes assigned to switches serving rate centers in the Omaha MSA**
 - For example, the LERG identifies (1) DMS 500, (1) DMS 100/200 and (1) 5ESS competitive switches with a total potential capacity of 400,000 lines
- ❑ **Intermodal competitors include Cable, Wireless and VoIP providers**
 - Cox Cable is providing cable-based telephone to more than 7,500 commercial customers. Cox has become the 12th largest telephone company in the US, targeting ILEC customers –
 - “We want the RBOC’s customers... we view ourselves as a CLEC”
 - Verizon, Sprint, Alltel, Nextel, Cricket and U.S. Cellular provide wireless services in the Omaha MSA
 - Service is available from at least one of these carriers in every Qwest wire center in the Omaha MSA
 - Seven VoIP providers are available to any customer in the Omaha MSA with a broadband internet connection: Vonage, AT&T, Five Star, Packet8, VoicePulse, Broadvoice and Zipglobal
 - Verizon, SBC, BellSouth and Time Warner have announced plans to deploy VoIP in this area.

State Actions to Deregulate Local Service in the Omaha MSA

- ❑ **The Nebraska Public Service Commission does not regulate Qwest's local services and robust competition has developed.**
 - **Legislative Bill 835, enacted in April 1986, resulted in Rate of Return Deregulation of Qwest's services.**
- ❑ **On March 17, 2005 Iowa Governor Vilsack signed HB 277 into law providing for the deregulation of local exchange retail residential and business telephone rates of the three incumbent telephone companies in the state.**
 - **Effective July 1, 2005 and until July 1, 2008, the jurisdiction of the Iowa Utility Board is limited to the first single-line flat rated residential and business service rates provided by a telephone phone utility subject to rate regulation on January 1, 2005.**

Effects of Competition on Qwest's Access Line Base in the Omaha MSA

Qwest Retail Lines in Service^[1]	December 2000	February 2004	Difference	% Change
Residence	236,725	136,572	(100,153)	(42.3)%
Business	113,624	81,749	(31,875)	(28.1)%
Total	350,349	218,321	(132,028)	(37.7)%

^[1] Excludes Public Coin and Qwest Official Company Service (OCS) access lines.

Access Line Breakout for Omaha MSA as of February 2004 REDACTED

	Residence	Business	Total
Resold lines	REDACTED	REDACTED	REDACTED
UNE-P listings	REDACTED	REDACTED	REDACTED
E911 records	REDACTED	REDACTED	REDACTED
Total CLEC lines	REDACTED	REDACTED	REDACTED
Qwest retail lines and % market share	REDACTED	REDACTED	REDACTED
Total Omaha MSA market lines	REDACTED	REDACTED	REDACTED
% CLEC lines in Omaha MSA	REDACTED	REDACTED	REDACTED

Qwest's Omaha MSA Forbearance Petition

Relief requested:

Obligations Affected:

251(h)(1)	<ul style="list-style-type: none"> • Incumbent LEC designation & regulation • 251(c) obligations
251(c)	<ul style="list-style-type: none"> • Unbundled access to narrowband UNE loops and transport • Interconnection at any technically feasible point • TELRIC pricing • Resale at a discount • Collocation
271(c)(2)(B)i-vi & xiv	<ul style="list-style-type: none"> • Interconnection at any feasible point • Access to poles and ducts • Access to narrowband loop and transport network elements • Access to switching network element • Resale at a discount
Relief from Dominant Carrier Regulation of Interstate Services	<ul style="list-style-type: none"> • Tariffing and cost support for Special and Switched Access Services

Relief Requested: Forbearance from ILEC Regulation in the Omaha MSA

- ❑ The public interest will be served by forbearance from these provisions, because it will eliminate the economic distortions caused by imposition of onerous requirements on Qwest that are not imposed on similarly-situated providers. For example:**
 - Qwest would no longer be obligated to resell its services at a discount, but it would continue to be subject to the resale requirements of Section 251(b)(1) that apply to all providers of local exchange service.**
 - For interconnection, Qwest is asking for forbearance from cost-distorting requirements that CLECs can designate any feasible point of interconnection, but Qwest would continue to be subject to the interconnection requirements of Section 251(a)(1) that apply to all carriers.**
 - Qwest has a proven record of entering into commercial agreements to provide carriers with access to network elements.**

Relief Requested: Forbearance from Dominant Carrier Regulation

- ❑ **In making a determination that a carrier does not have market power and therefore is not dominant, the Commission has relied on several factors as part of its analysis, including: (i) market participants; (ii) market share; (iii) the demand elasticity of customers; (iv) the supply elasticity of the market; and (v) the carrier's cost, structure, size and resources.**
- ❑ **An examination of each of these factors demonstrates that Qwest is clearly not dominant in the Omaha MSA market for residential and business telecommunications services, and cannot exercise market power. As a result, Qwest's market position satisfies the established thresholds for Section 10 forbearance:**
 - First, dominant carrier regulation of Qwest's telecommunications services is no longer necessary to ensure that rates and practices in the Omaha MSA are just, reasonable, and not unreasonably discriminatory. Qwest does not have the power to control price in this market nor the ability to act in a discriminatory manner.
 - Second, because Qwest cannot control prices or act in a discriminatory manner, it is simply not necessary to continue dominant carrier regulation of Qwest's services in order to protect consumers in the Omaha MSA.
 - Third, continuing to subject Qwest's services to dominant carrier regulation deprives customers of the benefits of true competition by imposing unnecessary regulatory costs on Qwest, and hampers Qwest's ability to quickly and effectively respond to competitive initiatives.

Sections 251(c) and 271 Have Been “Fully Implemented”

- ❑ Under the Communications Act, forbearance from Sections 251(c) and 271 cannot be granted until after those sections have been “fully implemented.”**
- ❑ The Commission concluded in the 271 Broadband Order that the checklist requirements of Section 271(c) have been “fully implemented” for purposes of section 10(d) throughout the United States, including in Nebraska, because the BOCs have obtained Section 271 authority in each of their states. As a result, this issue is no longer in contention.**
 - “We find that the checklist portion of 271(c) is “fully implemented” once section 271 authority is obtained in a particular state. Accordingly, because the BOCs have obtained section 271 authority in all of their states, we find that the checklist requirements of section 271(c) are “fully implemented” for purposes of section 10(d) throughout the United States.”**

Memorandum Report and Order, (FCC-04-254) WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Paragraph 15.
- ❑ Qwest has been granted interLATA authority in all of its states based on the full implementation of those sections.**
- ❑ Accordingly, upon a proper Section 10 showing (which Qwest has made), forbearance from Sections 251(c) and 271 is appropriate and lawful.**

Qwest Meets the Statutory Forbearance Standards

- ❑ **Section 10 of the Act specifies three criteria that, when met, mandate forbearance from the applicable rule or statutory provision:**
 - Is the regulation “necessary” to protect the public against unjust, unreasonable or discriminatory prices or practices?
 - Is the regulation necessary to protect “consumers?”
 - Is forbearance in the public interest?
- ❑ **As Qwest now has a minority market share in Omaha, these criteria are clearly met. Qwest cannot behave in an anticompetitive manner without causing economic damage to itself.**
- ❑ **In the 271 Broadband Order, the Commission recognized that under the particular circumstances relevant to the instant analysis, it was appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream real [broadband] market.** *Memorandum Report and Order, (FCC-04-254) WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Paragraph 21.*
 - Circumstances are the same in Omaha.
- ❑ **The TRRO specifies that forbearance is appropriate in circumstances where intermodal competition creates an environment where Section 10 criteria are met (TRRO, paragraph 39, notes 120 and 121).**
 - Qwest did not meet TRRO “wire center” tests for loop and transport relief from unbundling because competitors did not use Qwest facilities.
 - On this basis, the TRRO order specifically mentioned Qwest’s competitive situation in Omaha as being appropriate for resolution by forbearance.

The Act Focuses on Consumer Welfare, Not Protection of Individual Competitors

- ☐ **Existence of consumer choice requires grant of Qwest's Petition.**
- ☐ **Consumer welfare and benefits of competition are well documented.**
- ☐ **Some opponents (e.g., Cox and AT&T) claim that consumer welfare is irrelevant, and that the Commission must focus solely on the ability of wholesale providers to use Qwest's facilities without regard to consumer welfare or consumer choice.**
- ☐ **These arguments are a misreading of Section 10 of the Act. Forbearance is required whenever consumers are protected, as evaluated under the three prongs of Section 10.**
- ☐ **In any event, the retail competition which mandates grant of the Qwest Petition also provides critical economic incentives to Qwest to respond in a pro-competitive manner.**

Appendix

Iowa Utility Board Inconsistencies

(emphasis added below)

- ❑ **“The Board finds that there is sufficient evidence in the record to support a finding of effective competition in the Council Bluffs residential and business markets, and therefore, the Board will deregulate the rates for local exchange service throughout this community.”**
Docket No. INU-04-, page 26 (December 23, 2004)
- ❑ Notwithstanding their finding the Business and Residential Markets in Council Bluffs to be competitive enough for deregulation, the Iowa Utility Board is unwilling to truly let the market operate as it should.
- ❑ **In the Deregulation Order:**
 - **“Cox Iowa...serves a substantial percentage of the residential service market in Council Bluffs as well as a considerable percentage of business service through its own cable network. The record also demonstrates that Cox Iowa’s network overlaps nearly all of Qwest’s network in Council Bluffs.”**
 - **“The number of CLECs providing residential and business service in Council Bluffs, ...indicates that there are comparable services or facilities available in the Council Bluffs residential and business markets from a telecommunications provider other than the incumbent.”**
 - **“The record supports a finding that the widespread presence of Cox in Iowa, as well as the presence of a significant number of smaller CLECs throughout the Council Bluffs market, creates a competitive environment where market forces are active and sufficient to ensure just and reasonable rates.”**
 - **“However, it is likely that there will be a certain level of uncertainty in the local exchange marketplace for the foreseeable future. The Board cannot wait for all questions to be resolved...and still fulfill its statutory duty o deregulate services and facilities that are currently subject to effective competition.”**
 - **“While the likelihood that another facilities-based wireline competitor will enter these markets may be small, the Board finds the likelihood that the Council Bluffs residential and business markets has and will see entry from wireless providers and from other nascent technologies, such as VoIP using cable, DSL or power lines, is certain.”**
- ❑ **In filed Comments regarding Qwest’s Petition:**
 - **“The Council Bluffs retail market has developed a level of competition that was envisioned by the passing of the 1996 Telecommunication s Act . Qwest maintains only a slight majority of retail connections in both the residential and business retail markets.”**
 - **“Regardless of the competitor, all are dependent upon Qwest to furnish wholesale facilities or services.....without the availability of the various wholesale elements, competitors would be unable to provide a finished retail service or products for their customers.”**
 - **“...competitors will need to have access to the wholesale facilities and services...”**
 - **“the Council Bluffs market could become a service areas with only two facilities-based service providers, Qwest... and Cox Communications”**



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